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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Ms. Suzan Balk Friedman
Tariff Division
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Expanded Interconnection Tariff Investigation, CC Docket No. 94-97; Freedom of Information Act Requests (Control No. 94-310, 324, and 328, DA 1214) for Certain Cost Data Filed by Southwestern Bell Telephone Company in Connection with its Virtual Collocation Tariff

Dear Ms. Friedman:

Pursuant to your request, MFS Communications Company, Inc. (MFS"), by its undersigned counsel, hereby respectfully submits the following informal comments with regard to the proposed terms for the protective order submitted by Southwestern Bell Telephone Company ("SWBT") in the above referenced proceeding.

At the outset, MFS wishes to emphasize that its willingness to participate in the ongoing discussion of the terms of the SWBT protective order should not in any sense be construed as a concession by MFS that the use of a protective order or any other form of restriction on its access to SWBT's cost support data is either necessary or appropriate. MFS's submission of comments addressing SWBT's proposed protective order is intended solely to expedite disclosure of the requested information to MFS. Accordingly, MFS's participation in these discussions should not be viewed as offering any support whatsoever for the proposition that limited disclosure pursuant to a protective order or otherwise is warranted in this or in any other proceeding, with respect to MFS or any other party. On this basis, MFS offers the following comments with respect to the terms of the proposed protective order which SWBT submitted to the Commission on July 13, 1995:

1. Definition of "Confidential Information." MFS recommends that the Commission add the following language to Section 3 in the proposed protective order. Specifically, at the end of the paragraph, the following language should be inserted:

No. of Copies rec'd 602
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Ms. Suzan Balk Friedman
August 18, 1995
Page 2

"Confidential Information" shall not include information contained in the public files of the Federal Communications Commission that is subject to disclosure under the Communications Act of 1934 or any Commission regulations. Nor shall it include information that, at the time it is provided through discovery in these proceedings or prior thereto, is or was public knowledge, or which becomes public knowledge other than through disclosure in violation of this Order. Nor shall it include information found by the Commission or a court of competent jurisdiction not to merit the protection afforded "Confidential Information" protection under the terms of this Order

MFS submits that the foregoing language clarifies the definition. The additional language also provides a balanced definition that adequately protects the interests of all parties.

2. Bifurcated Treatment of Confidential Information. MFS objects to the bifurcation of the definition of confidential information into "Confidential Information" and "Highly Sensitive Confidential Information" in Section 3 of the proposed protective order. The protective order's procedures for protecting "Confidential Information" reasonably protects any legitimate interests of SWBT. For instance, both the proposed protective order and the Commission's decision granting MFS' Freedom of Information Act ("FOIA") request state that such confidential information cannot be used in any manner other than for the purposes of this proceeding. Further, all such materials must be returned to the party that produced the "Confidential Information." Moreover, SWBT has made no showing that such a heightened category of protection is reasonable or necessary

On the other hand, the classification of information as "Highly Sensitive Confidential Information" and the accompanying stringent regulation provides SWBT with the opportunity to misuse the protective order process to block efforts of MFS to examine SWBT's cost data and to comment on the lawfulness of its proposed rates. Specifically, MFS objects to Section 10 under "Procedures - Highly Sensitive Confidential Information." The proposed procedures -- (1) limiting availability of such materials to the producing party's Washington, D.C. location, (2) only allowing access to "Highly Confidential Information" by the taking of notes, and (3) restricting the explicit replication of "Highly Sensitive Confidential Information" in any notes taken -- are unduly burdensome, unnecessary to protect SWBT's legitimate interests, and allow SWBT to impede MFS' investigation into whether SWBT's rates are just and reasonable.

In addition, the proposed requirement that notes containing explicit replication of "Highly Sensitive Confidential Information" shall not be allowed out of the room in which such information is stored cannot be enforced unless SWBT personnel review such notes. To the extent that SWBT proposes to review notes taken by counsel of opposing parties, such action

would clearly violate the attorney work product privilege.^{1/} SWBT's proposal is an outrageous attempt to intrude on the attorney work product privilege. In light of counsel's ethical obligations to the client, counsel cannot agree to submit privileged materials for SWBT's inspection. Accordingly, the Sections 4 and 10 as well as any other references to "Highly Sensitive Confidential Information" in the proposed protective order should be deleted.

3. Restriction of Access to Confidential Information to Five Persons. MFS objects to the limitation in Section 6 that only up to five persons may have access to "Confidential Information" produced. Such a limitation is completely arbitrary. SWBT has made no showing that such a limitation is necessary to protect any legitimate interest, and indeed, no such showing is possible. Conversely, the proposed limit would hinder the ability of investigating parties from determining whether SWBT's rates are lawful since the limit would restrict the number of experts and counsel that could review the information. Thus, the limit on the number of persons who would be permitted access to "Confidential Information" should be deleted from Section 6.

4. Two Hundred Page Limit. Section 9 of the proposed protective order should be augmented by adding the following sentence at the end of the second paragraph, "If the ordered material is voluminous, the requesting party may review the voluminous material at SWBT's Washington, D.C. office and designate material to be produced that is under 200 pages."

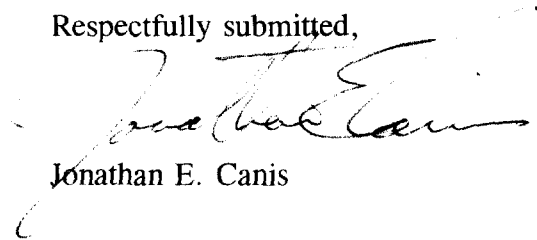
^{1/} See e.g. *Cox, et al. v. Administrator United States Steel & Carnegie, et. al.*, 17 F.3d 1386, 1421 (11th Cir. 1994) (Court stated that the attorney work product privilege traces its roots to the recognition by the Supreme Court that "'it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by the opposing parties and their counsel.'" (citing *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947))); *Six Grand Jury Witnesses*, 979 F.2d 939, 944 (2d Cir. 1992) (Court stated that the work product doctrine provides a zone of privacy for a lawyer; the doctrine grants counsel an opportunity to prepare a client's case without fear of intrusion by an adversary.); *Safeguard Services, Inc. v. Securities Exchange Commission*, 926 F.2d 1197, 1202 (D.C. Cir. 1992) (court found that approximately fifty pages of notes memorializing the legal research of Appellee's lawyers should not be produced to Appellant because the materials constituted attorney work product); *Martin v. Office of Special Counsel, Merit Protection Board*, 819 F.2d 1181, 1183 (D.C. Cir. 1987) (court noted that a number of documents were withheld, including attorney notes and witness statements because they were classic examples of attorney work product).

Ms. Suzan Balk Friedman
August 18, 1995
Page 4

MFS would find the proposed protective order, as revised in accordance to MFS' recommendations, an acceptable compromise agreement. Such a protective order would achieve the appropriate balance between the equipment vendors' interest in protecting competitively sensitive information and the public interest of access to cost support data for tariff filings.

Should you have any questions regarding this letter, please contact me at 202/424-7673.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jonathan E. Canis", is written over a horizontal line.

Jonathan E. Canis

cc: William Caton, Acting Secretary (original and 2 copies)
Kathryn Conley, Records Management Division
Andrew D. Lipman (MFS)

Ms. Suzan Balk Friedman
August 18, 1995
Page 5

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